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No. 07-9

In the

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON, FRANCIS VANER JOHNSON, and JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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INTRODUCTION

In this case the First Circuit held that jurisdiction under the Clean Water Act may be established using the test announced in Justice Scalia's plurality opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), or Justice Kennedy's concurring opinion in the same case. The First Circuit's holding squarely conflicts with the views of the Seventh and Ninth Circuits. Petitioners have a significant interest in the Court's immediate resolution of this conflict: as it now stands, Petitioners must defend against jurisdiction using two distinct tests, thus for practical purposes doubling pre-trial discovery work and substantially increasing total litigation costs. The Court's deciding of the issue now would also serve judicial economy and the rule of law by resolving a circuit split of capital importance. And the Court need have no fear of acting prematurely, because the issue presented for review is purely legal and the Court's resolution would not be aided by additional factual development.

ARGUMENT

Contrary to the government's contention, the question presented is not simply whether Petitioners' cranberry bogs are "waters of the United States." Rather, this Court is asked to act consistent with its traditional role as arbiter of the rule of the law and resolve an existing circuit split regarding the interpretation of *Rapanos*. None of the reasons advanced by the government for denying the writ is convincing.

I

GRANT OF THE WRIT IS APPROPRIATE NOTWITHSTANDING THE CASE'S INTERLOCUTORY POSTURE

The government contends that the interlocutory posture of this case is sufficient reason not to review the First Circuit's decision. That is no doubt the general rule, *see, e.g.*,

Am. Constr. Co. v. Jacksonville, T. & K. W. RY. Co., 148 U.S. 372, 384 (1893), but where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stern, et al., *Supreme Court Practice*, 196 (7th ed. 1993) (citing numerous authorities). Here, Petitioners present both an important and clear-cut issue: which jurisdictional test announced in *Rapanos* is controlling. That issue is fundamental to the conduct of further proceedings in this case because, as noted above, the requirement to defend against two distinct jurisdictional arguments greatly increases the pretrial and trial work in this case, and imposes a significant burden on Petitioners. That burden would be removed by this Court's decision to review the issue now, and nothing would be gained by the Court's waiting to address the issue until after final judgment has been entered. Although it may turn out that jurisdiction is lacking over Petitioners' cranberry bogs under either the Scalia or Kennedy test, the case's ultimate resolution in Petitioners' favor will not compensate them for the considerable expenditure of time and effort in the trial court defending against jurisdiction under two contrary tests. Therefore, immediate review of the First Circuit's decision is warranted.

II

GRANT OF THE WRIT IS APPROPRIATE GIVEN THE COURT OF APPEALS' MISINTERPRETATION OF *MARKS* AND *RAPANOS*

The government contends that Justice Scalia's plurality opinion in *Rapanos* is not controlling under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), and therefore there is no reason for this Court to review the First Circuit's judgment. That argument is without merit.

Under *Marks*, when no opinion of this Court enjoys the support of a majority of the Justices, the case's holding may be taken as "that position . . . by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* (internal quotation marks omitted). The government erroneously interprets *Marks* to divine two controlling—and contradictory—rules in *Rapanos*. Opp'n at 10-13. The government's error derives from two points: one, neither the *Rapanos* plurality opinion nor the concurring opinion of Justice Kennedy is a logical subset of the other; and two, when conducting the *Marks* inquiry, it is appropriate to refer to the views of dissenting Justices.

On the first point, Justice Scalia's test is fairly considered a logical subset of Justice Kennedy's test, because in probably all circumstances where jurisdiction obtains under Justice Scalia's opinion, the same will be true under Justice Kennedy's test. *See Rapanos*, 126 S. Ct. at 2235 n.15. Although some have argued that Justice Kennedy's test could be read in theory to be, on the rare occasion, a subset of the plurality test, two of the circuit courts to have addressed that issue have dismissed its importance. *See United States v. Gerke Excavating Co.*, 464 F.3d 723, 725 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, No. 04-15442, 2007 WL 2230186, at *6 (9th Cir. Aug. 6, 2007). Further, the government's interpretation of *Marks*, *see* Opp'n at 14-15, here suffers from the same unfounded supposition noted by the court of appeals below, namely, "narrowest grounds" must translate to "least restrictive" of federal authority. *See United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006).

On the second point, the government attempts to justify the lower court's interpretation of *Rapanos* (an interpretation, again, at odds with that of the Seventh and Ninth Circuits) by attempting to cobble together a rule of law from a melange of plurality, concurring, and dissenting opinions. *See* Opp'n at 11-12 . *See also Johnson*, 467 F.3d at 65-66. The government's

efforts are flawed both because they are unfaithful to *Marks*, and, perhaps more significantly, are inconsistent with basic principles of Article III jurisprudence. *Marks* itself states plainly that the analysis must hinge upon the views of those Justices concurring in the *judgment*; obviously, the views of dissenting Justices would not so qualify. *See King v. Palmer*, 950 F.2d 771, 793 (D.C. Cir. 1991) (en banc). And reliance upon dissenting Justices' views as part of the *Marks* inquiry is unfounded also because federal courts may only expound the law to the extent that their opinions are tied to a judgment; that is, to the extent that the courts resolve an actual "Case or Controversy." Given that the views of dissenting justices have no effect, by definition, on the Court's disposition of an actual case or controversy, it follows that their views as to the controlling rule of law are without binding power.

In this case, however, the First Circuit determined both that *Rapanos* contains no "logical subset" opinion, *see Johnson*, 467 F.3d at 63-64, and that reliance upon the views (or at least the votes) of the *Rapanos* dissenters is appropriate. The government advances the same position in opposing the writ. Yet the First Circuit's decision both creates a circuit split and misconstrues the *Marks* inquiry. That the three courts of appeals to have applied *Marks* to *Rapanos* have produced conflicting decisions, and thus inconsistent jurisdictional tests, confirms the appropriateness of this Court's review.

III

GRANT OF THE WRIT IS APPROPRIATE BECAUSE THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE SEVENTH AND NINTH CIRCUITS

The government contends that the First Circuit's decision does not conflict with that of Seventh or Ninth Circuit because all three courts determined that jurisdiction can be established under Justice Kennedy's test, and because the Seventh and

Ninth Circuits purportedly declined to rule on whether the plurality approach is also appropriate. *See* Opp'n at 15-18. The government's characterizations of the Seventh Circuit's decision in *Gerke* and the Ninth Circuit's decision in *Healdsburg* are inaccurate, for two reasons.

First, regardless of the government's interpretations, the *First Circuit* itself recognized the difference between its views and those of the Seventh and Ninth Circuits. *See Johnson*, 467 F.3d at 64 (noting that Seventh and Ninth Circuits advocate "Justice Kennedy's test [as] the single controlling test").

Second, the government's seizing upon the allegedly limiting language in the *Gerke* and *Healdsburg* opinions is inappropriate. To be sure, *Gerke* noted that in a "rare case" a given wetland would pass jurisdictional muster under the *Rapanos* plurality test but not Justice Kennedy's. *See Gerke*, 464 F.3d at 725. But that was based on a mischaracterization of the plurality test. Under that test, a small and remote surface water connection would never suffice to establish federal jurisdiction. To the contrary, the plurality determined the Clean Water Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters and only those wetlands abutting these water bodies such that the wetland and the covered water are "indistinguishable." *Rapanos*, 126 S. Ct. at 2225, 2234 (plurality opinion). In contrast, the Kennedy test places no limits on physical proximity to navigable-in-fact waters and does not even require a hydrological connection to any tributary to a navigable-in-fact water. Moreover, the *Gerke* court used that "practical" (if incorrect) observation to buttress its *legal* conclusion that the Kennedy test—and that alone—is controlling. *See Gerke*, 464 F.3d at 724 (concluding that under *Marks* Justice Kennedy's opinion represents the narrowest grounds and therefore is the opinion "lower-court judges are to

follow"). A similar analysis pertains to the Ninth Circuit's decision in *Healdsburg*. Indeed, *Healdsburg* expressly adopted *Gerke*'s reasoning on this point. *See Healdsburg*, 2007 WL 2230186, at *6 (noting that Justice Kennedy's concurrence constitutes the "narrowest ground").

Thus, this Court is presented with two conflicting rules, developed by the courts of appeals in the months following *Rapanos*: (1) jurisdiction may be established under either the plurality test or that of Justice Kennedy; or (2) jurisdiction must be established under Justice Kennedy's test. The writ should therefore be granted to resolve this pressing conflict.

IV

GRANT OF THE WRIT IS APPROPRIATE BECAUSE THE "SIGNIFICANT NEXUS" TEST RAISES SERIOUS DUE PROCESS CONCERNS

The government dismisses Petitioners' fears of potential violations of due process through the inconsistent application of Justice Kennedy's "significant nexus" test because Petitioners have purportedly failed to demonstrate that the test is impermissibly vague. *See* Opp'n at 18. Yet the government ignores the conclusions of one district court and the dissent below, who made related points. *See United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (significant nexus test "leaves no guidance on how to implement its vague, subjective centerpiece"); *Johnson*, 467 F.3d at 66 (significant nexus test "leaves the door open to continued federal overreach") (Torruella, Circuit Judge, dissenting). The inconsistent and unpredictable results to be expected from the application of Justice Kennedy's "significant nexus" test, a test whose use was authorized by the court below, stand as sufficient reason for this Court's review.

CONCLUSION

Petitioners' case presents two important and related questions for review: when and how is *Marks* to be applied, and what is the controlling rule of law in *Rapanos*. The courts of appeal are split on both questions. Review of those questions will affect in one manner or another citizens throughout the country; a deferred resolution of those issues will, broadly speaking, impose a great burden on the regulated public, and, in terms of this case, place a significant hardship on Petitioners. Therefore, the writ of certiorari should be granted.

DATED: September, 2007.

Respectfully submitted,

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